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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

COLIN M. GONZALES, et al.,

Petitioners,

v.

FAIRFAX-BREWSTER SCHOOL, INC., et al.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

COLIN M. GONZALES, *et al.*,

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v.

FAIRFAX-BREWSTER SCHOOL, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.[1]

[1] Petitioners, plaintiffs below, consist of Colin M. Gonzales and Michael C. McCrary, infants, who brought this action through their respective parents, as well as their parents, Raymond Gonzales and Margaret R. Gonzales, and Curtis L. McCrary and Sandra McCrary. Respondents consist of defendants Fairfax-Brewster School, Inc., Russell L. Runyon and Katheryne E. Runyon, d/b/a Bobbe's Private School, and defendant-intervenor Southern Independent School Association.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-6a) is reported at 569 F.2d 1294. The relevant order of the district court (App. D, *infra*, pp. 10a-11a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 7a-8a) was entered on January 20, 1978. Petitioners filed a petition for rehearing and suggestion for rehearing *en banc* which was denied by the court of appeals by its order entered March 29, 1978 (App. C, *infra*, p. 9a). On June 20, 1978, Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including July 27, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988), which Congress directed to be applied to cases pending at the time of its enactment, is applicable to the instant case, which, at the time the statute was enacted, had been remanded from this Court and was pending in the district court awaiting the resolution of issues concerning taxation of costs.

STATUTE INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988) provides as follows:

> § 1988. **Proceedings in vindication of civil rights** . . . In any action or proceeding to enforce a provision of §§ 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681 *et seq.*], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 U.S.C. §§*1 et seq.*], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. [As amended Oct. 19, 1976, P. L. 94-559, § 2, 90 Stat. 2641.]

STATEMENT

Because this case was pending in the district court when the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988) became effective, plaintiffs moved for an award of attorneys' fees pursuant to the congressional direction that the new statute be applied to all cases pending on the date of its enactment. Contrary to the congressional instruction and to controlling authorities, the district court, with the court of appeals affirmance, denied plaintiffs' motion for attorneys' fees.

This is the latest and final stage of an historic civil rights case in which this Court held on June 25, 1976, that private schools are prohibited by the Civil Rights Act of 1866 (42 U.S.C. § 1981) from denying admission to individuals on the basis of race. *Runyon v. McCrary*, 427 U.S. 160. This proceeding originated with the filing of

two complaints in the district court on December 19, 1972. The cases were consolidated for trial and on July 27, 1973, the district court issued its decision holding that the defendant schools violated 42 U.S.C. §1981 by denying admission to Colin M. Gonzales and Michael C. McCrary because they are black. 363 F. Supp. 1200. The court ordered appropriate injunctive relief and awarded compensatory damages. The district court also awarded plaintiffs their costs, as well as attorneys' fees in the amount of $1,000 against each of the defendant schools (*infra*, p. 2a).

On appeal, the court of appeals affirmed the district court's injunctive order and award of damages. 515 F.2d 1082. However, the court of appeals reversed the district court's award of attorneys' fees, holding that in the absence of any statutory authorization such award was inappropriate under the "private attorney general" doctrine, and that the facts did not warrant an award on the theory that the defendants had displayed bad faith or obdurate obstinancy (*infra*, p. 3a).

Upon the petitions of defendants and the defendant-intervenor, this Court granted certiorari and affirmed the holding of the court of appeals that the defendant schools had violated 42 U.S.C. §1981 by their racially discriminatory admission policies. In addition, this Court granted plaintiffs' cross-petition for certiorari on the issue of attorneys' fees, but rejected plaintiffs' contention that they should be awarded such fees under the bad faith exception to the established American rule. This Court's judgment was issued on August 11, 1976, and provided, among other things, that the costs of printing the record should be shared equally by the parties and therefore that defendants should recover from plaintiffs specific amounts

stated in the judgment. The Court's judgment was mailed to the clerk of the court of appeals who in turn forwarded it to the clerk's office of the district court where it was received on August 16, 1976 (*infra*, p. 3a).

The Civil Rights Attorney's Fees Awards Act of 1976 was signed into law by President Ford on October 19, 1976. Since its legislative history as well as controlling case law indicate that the statute was to be applied to cases pending at the time the statute became effective, plaintiffs, on November 1, 1976, filed a motion in the district court for an award of costs, including attorneys' fees. Plaintiffs' motion noted that the district court had not acted on their request for taxation of costs in that court under 28 U.S.C. §1920.[2] In their motion, plaintiffs further noted that the costs of printing the record in this Court awarded under this Court's judgment of August 11, 1976, had not been taxed by the clerk of the district court as part of that court's final judgment. The motion requested that the district court enter an order settling costs and awarding attorneys' fees as provided in the 1976 statute. While plaintiffs' motion was pending in the district court, the defendants each filed motions in the court of appeals requesting that it order plaintiffs to reimburse them for a proportionate share of the cost of printing the appendix used on the appeal in that court (*infra*, p. 4a, n.4).[3]

[2] In their bills of costs filed in the district court on April 25, 1975, plaintiffs had claimed $153.09 from Fairfax-Brewster School and $162.37 from Bobbe's Private School. These amounts included fees for filing and service of the complaint, the cost of deposition transcripts used at trial, and the trial transcript used on appeal.

[3] The court of appeals had entered its judgment on the merits of the appeals nearly two years earlier, on April 15, 1975.

On December 14, 1976, the district court denied plaintiffs' motion for costs, thus reversing its 1973 decision awarding costs to plaintiffs. In addition, the court denied plaintiffs' motion for an award of attorneys' fees pursuant to the Attorney's Fees Awards Act of 1976. The district court further ordered that the cost of printing the record awarded to defendants by this Court should be paid by plaintiffs as specified in this Court's judgment. Finally, the district court noted that its order did not constitute a ruling concerning defendants' motions then pending in the court of appeals seeking to compel plaintiffs to share the cost of printing the appendix used on appeal (*infra*, pp. 10a-11a).

On January 24, 1977, the court of appeals granted defendants' two motions and ordered plaintiffs to pay a proportionate share of the cost of printing the appellate appendix (*infra*, p. 4a, n.4).

On plaintiffs' appeal from the district court's order, denying their motion for costs including attorneys' fees, the court of appeals, on January 20, 1978, issued its decision affirming the district court's denial to plaintiffs of an award of attorneys' fees. While not disputing that the case was pending in the district court at the time of enactment of the Attorney's Fees Awards Act of 1976, the court nevertheless held the statute was not applicable to the case for two reasons. First, distinguishing *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974), which, like this case, involved the applicability of a newly-enacted attorneys' fee statute to a pending proceeding, the court of appeals noted that in that case the new law became effective while the case was pending on appeal, whereas here the new law did not become effective until two months after this Court's judgment had been

filed in the district court. The court thus construed *Bradley* as holding, not that a new law such as the Awards Act of 1976 is applicable to all cases pending at the time of the law's enactment, but that it is applicable only to cases pending on appeal. As the second ground for its decision, the court of appeals held that since this Court's judgment, which had been issued over two months before enactment of the statute, contained no authorization for an award of attorneys' fees, the district court was without authority to reopen the case to consider that issue (*infra*, pp. 4a-6a).

As a final matter, the court of appeals reversed the district court's ruling that each party should bear its own costs. The court of appeals held that after the district court awarded costs to plaintiffs in its order of July 27, 1973, that award became a finality, and the district court had no authority to alter it in carrying out the mandate of this Court. The court of appeals therefore remanded the proceeding to the district court to reinstate the taxation of costs under 28 U.S.C § 1920 in favor of plaintiffs (*infra*, p. 6a).[4]

REASONS FOR GRANTING THE WRIT

The court of appeals' decision in this case should be reversed because it is directly contrary to the explicit con-

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[4] On remand, the district court, on June 13, 1978, entered orders taxing costs of $100.32 against Fairfax-Brewster School and $103.32 against Bobbe's School. The costs of deposition transcripts used at trial claimed against the two schools in the amounts of $42.77 and $59.25, respectively, were disallowed.

gressional direction that the Civil Rights Attorney's Fees Awards Act of 1976 be applied to all cases pending on the date of its enactment. In addition, the court's holding is in irreconcilable conflict with controlling decisions of this Court.

The 1976 Act specifically entitles the prevailing party in a case brought under 42 U.S.C. §1981, the statute involved here, to recover "an award of attorney's fees as an item of costs." *Hutto v. Finney*, ___ U.S. _____, 46 U.S.L.W. 4822 (decided June 23, 1978). There can be no doubt here that the matter of costs remained unresolved and that the case therefore was still pending in the district court on October 19, 1976, when the new Act became effective. Nor was the cost issue immediately resolved by the district court, for its order of December 14, 1976, denying costs to plaintiffs was held to be reversible error by the court of appeals, which remanded the case to the district court for taxation of costs in favor of plaintiffs. Further, the court of appeals itself, in an action signifying the continuing pendency of the case, on January 24, 1977, granted defendants' motions for reimbursement of the cost of printing the appendix used on appeal.

As this Court stated in *Hutto v. Finney, supra*, the Civil Rights Attorney's Fees Awards Act of 1976 "could not be broader. It applies to 'any' action brought to enforce certain civil rights laws." ___ U.S. ___, 46 U.S.L.W. at 4821. It is clear beyond peradventure that among the actions that Congress intended to be covered by the Act are those that were pending on its effective date. This case obviously was pending on October 19, 1976, and indeeed, the court of appeals did not hold otherwise. Hence, there is no justification for the court's

disregarding the explicit congressional instruction, contained in the legislative history of the Act, that it be applied to a case such as this. When the statute was under consideration by the House of Representatives, an amendment was offered by Representative Ashbrook designed to "exempt from the coverage of this act all of those hundreds of cases which are pending right now." (122 Cong. Rec. H 12166, 94th Cong. 2nd Sess. (1976, daily ed.)). The amendment stated:

> The provisions of this act shall take effect upon enactment and shall be applicable to cases filed only after the effective date of this act.

The Ashbrook amendment was decisively defeated by a vote of 268 to 104 (*ibid.*) Similarly, elsewhere in the legislative history there is abundant evidence of the unmistakable congressional intent to apply the statute to all cases pending on its effective date. See, *e.g.*, statements of Senator Abourezk, the Senate manager of the bill (122 Cong. Rec., *supra*, at S 17052) and Representative Drinan, the House manager (122 Cong. Rec., *supra*, at H 12160); H. R. Report No. 94-1558, 94th Cong., 2d Sess. p. 4, n.6 (1976); and remarks of Representative Anderson of Illinois (122 Cong. Rec., *supra*, at H 12155).

In holding that an attorneys' fee statute similar to the one herein was applicable to a pending case, this Court stated in *Bradley v. School Board of the City of Richmond, supra*, that it was anchoring its decision on the long-established principle that (416 U.S. at 711):

> [A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice

or there is statutory direction or legislative history to the contrary.

With respect to the Civil Rights Attorney's Fee Awards Act of 1976, the legislative history is crystal clear – Congress indicated its unmistakable intention that the statute was to be applied to all cases pending on its effective date.

The court of appeals, however, completely misreads *Bradley* as holding that the principle followed there is only applicable to cases pending on appeal at the time a new law becomes effective. Not only is there a total lack of evidence in the legislative history of the 1976 Act to indicate that Congress intended the statute to be applied to such a limited classs of pending cases, but the court of appeals' decision totally distorts the principle of judicial decision-making upon which the *Bradley* decision is grounded. For it is obvious that if a court of appeals is obligated to apply a new law to a case pending before it, *a fortiori*, a district court is under the same obligation. This is demonstrated beyond question by the decisions of this and other courts. *E.g. Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921); *Sampeyreac v. United States*, 7 Pet. 222, 239-240 (1833); *Ziffrin v. United States*, 318 U.S. 73, 78 (1943). See also *Perez v. Rodriguez Bou*, 575 F.2d 21, 24 (C.A. 1, 1978); *Beazer v. New York City Transit Authority*, 558 F.2d 97, 99-100 (C.A. 2, 1977); *Simpson v. Weeks*, 570 F.2d 240, 241, 244 (C.A. 8, 1978); *Keyes v. School District No. 1, Denver, Colo.*, 439 F.Supp. 393, 401 (D. Colo., 1977).

The second basis for the court of appeals' decision – that the district court lacked authority on remand to grant an award of attorneys' fees pursuant to the 1976

Act because this Court's mandate did not provide for such an award – is completely contrary to controlling decisions of this Court. In two cases (*Sprague v. Ticonic National Bank*, 307 U.S. 161 (1938); and *Perkins v. Standard Oil Co.*, 399 U.S. 222 (1970)) this Court has decided virtually the identical issue that is involved here. The court of appeals' refusal to follow those compelling precedents is inexplicable. In both of the cited cases, it had been held below that the district courts lacked authority, following proceedings in this Court, to grant attorneys' fee awards, and in both cases, this Court reversed and ruled to the contrary.

In the *Sprague* case, the plaintiff successfully established the right of herself and others to recover earmarked funds held in trust by an insolvent bank, and following this Court's affirmance (*Ticonic National Bank v. Sprague*, 303 U.S. 406 (1938)), plaintiff petitioned the district court for an award of attorneys' fees. The district court held, with the court of appeals' affirmance, that it had no authority to grant the petition because such an award had not been provided for in its original judgment and there was no provision for an award in this Court's mandate. In reversing, this Court stated that while its mandate "is controlling as to the matters within its compass," matters not covered by the mandate could properly be considered by the district court. 307 U.S. at 168. Since the equitable claim for attorneys' fees was based on considerations that could not be evaluated until the litigation, including the final appeal, was concluded, this Court held that the issue was sufficiently different from matters covered by the district court's original judgment and the appellate mandates that the district court was not foreclosed from considering the fee claim on its merits. Similarly here, since the Awards Act of 1976 did not become effective until after this

Court's judgment was entered, the issue of a statutory fee award was not considered by this Court and the matter therefore fell outside the Court's mandate.

To the same effect is *Perkins v. Standard Oil Co., supra,* where, following the plaintiff's success in this Court in a private antitrust action, he applied to the district court for a statutory award of attorneys' fees for legal services performed in the appellate stages of the litigation. The district court had awarded fees for services performed when the proceeding was originally before it, but denied the application for appellate fees and the court of appeals affirmed on the ground that such an award was not authorized by this Court's mandate. In a *per curiam* decision this Court reversed, holding that since the matter was outside the scope of its mandate, the attorney fee application was open for consideration by the district court. The Court noted that the appropriate time for determining the amount of an attorneys' fee award is at the conclusion of the appellate stages of the litigation, and that such a determination should be made in the first instance by the district court on the basis of evidence as to the extent and nature of the services rendered. 399 U.S. at 223.[5]

Though it is true, as the court of appeals herein noted, that plaintiffs unsuccessfully argued in this Court that they should receive an attorneys' fee award under the bad faith exception to the established American rule, the subsequent enactment by Congress of the Civil Rights Attorney's Fees

[5] In *Maddrix v. Dize,* 153 F.2d 274 (1946), the Fourth Circuit, in a decision totally at odds with its holding herein, applied the principle enunciated in the *Sprague* and *Perkins* cases to hold that this Court's mandate following its decision on the merits of a case does not preclude the district court's consideration of a subsequent application for an attorneys' fee award.

Awards Act of 1976 created an entirely new basis for such an award. Therefore, this Court's rejection of plaintiffs' bad faith contention did not preclude the district court's consideration of their motion for a statutory award of fees, because that matter was outside the scope of this Court's mandate. But even if one were to construe this Court's decision as a broader holding that plaintiffs were not entitled to attorneys' fees under any theory and to regard the mandate as having a correspondingly broad scope, that still would not preclude the application of the Awards Act of 1976 to this case. For the district court in such circumstances would be obligated to apply the Act to this case, because "the rule of law expressed by the mandate had been affected by a subsequently enacted federal statute." *Banco Nacional de Cuba v. Farr,* 383 F.2d 166, 178 (C.A. 2, 1967), cert. denied, 390 U.S. 956. As the Second Circuit held in the cited case, if a conflict arises in the course of litigation between the law of the case and a newly adopted act of Congress, a court is duty-bound to respect the latter. This obviously follows from the principle that a court must apply the law in effect at the time it renders its decision. *Bradley v. School Board of the City of Richmond, supra.*[6]

[6] Defendants argued in the court of appeals that it would be a "manifest injustice" to assess attorneys' fees against them because they are private schools with limited funds. The sources and extent of defendants' resources are not shown by the record but those resources have been adequate to enable defendants to conduct this litigation from the time the complaint was filed and to carry their appeals through successive stages without once abandoning their original contention that they were entitled to operate their schools on a racially discriminatory basis. An award of attorneys' fees was requested in the complaint and the propriety of such an award was litigated at every stage. Although defendants received favorable

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

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judicial rulings with respect to the attorneys' fee issue under the theories then being advanced, the enactment of the Awards Act of 1976 merely served "to create an additional basis or source for [defendants'] potential obligation to pay attorney's fees. It does not impose an additional or unforseeable obligation upon [them]." *Bradley v. School Board of the City of Richmond, supra,* 416 U.S. at 721. Further, it should be noted that plaintiffs' claim for attorneys' fees is also against the intervening organization, Southern Independent School Association, which, the record shows, has nearly 400 schools affiliated with it and has been an active participant in the litigation. Although it has been alleged that the association is dissolved, under the applicable provisions of the Georgia corporation statute, plaintiffs' claims for attorneys' fees, having been timely filed, would survive the dissolution. Ga. Code Ann. §22-3119.

APPENDIX A

Colin M. GONZALES, infant by his parents, Raymond Gonzales and Margaret R. Gonzales, and Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary, Appellants,

v.

FAIRFAX-BREWSTER SCHOOL, INC., Russell L. Runyon, Katheryne E. Runyon and Southern Independent School Association, Appellees.

No. 77-1278 1

United States Court of Appeals,
Fourth Circuit.

Argued Nov. 8, 1977.
Decided Jan. 20, 1978.

Roderic V.O. Boggs, Washington Lawyers' Committee for Civil Rights Under Law, Washington, D.C. (Allison W. Brown, Jr., Washington, D.C., Robert M. Alexander, Arlington, Va., on brief), for appellants.

Andrew A. Lipscomb, Bethesda, Md., for appellee Fairfax-Brewster School, Inc.

Louis Koutoulakos, Arlington, Va., for appellees Russell L. Runyon, Katheryne E. Runyon, d/b/a Bobbe's Private School.

Before HAYNSWORTH, Chief Judge, WINTER, Circuit Judge, and FIELD, Senior Circuit Judge.

FIELD, Senior Circuit Judge:

This is the epilogue to *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), in which the Supreme Court held that private schools are prohibited by the Civil Rights Act of 1866, 42 U.S.C. § 1981, from denying admission to individuals on the basis of race. When the case returned to the district court pursuant to the Supreme Court's judgment, counsel for the plaintiffs filed a motion seeking an award of attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, as amended, 90 Stat. 2641.[1] The motion was denied by the district court and this appeal followed.

A brief history of this litigation is essential to the disposition of this appeal. The proceedings originated with the filing of two complaints in the district court on December 19, 1972. The cases were consolidated and on July 27, 1973, the district court issued its decision in which it ruled in favor of the plaintiffs in both cases. The court ordered appropriate injunctive relief and awarded compensatory damages. The district court also held that the plaintiffs were entitled to attorneys' fees in the amount of $1,000.00 against each of the defendant schools.

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[1] The amendatory language is as follows:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Upon appeal to this court, the case was heard en banc and the majority of the court affirmed the district court's injunctive order and award of damages.[2] However, we reversed the district court's award of attorneys' fees, holding that in the absence of any statutory authorization such an award was inappropriate under the "private attorney general" doctrine, and that the facts did not warrant an award on the theory that the defendants had displayed bad faith or obdurate obstinacy.

Upon the petitions of the defendants, as well as the intervenor, the Supreme Court granted certiorari and affirmed the decision of this court upon the principal issues in the case. In addition, the Court granted the plaintiffs' cross-petition for certiorari on the issue of attorneys' fees, but rejected the plaintiffs' contention that they should be awarded such fees under the bad faith exception to the established American rule. The judgment of the Supreme Court was issued on August 11, 1976, and provided, among other things, that the costs of printing the record should be shared equally by the four parties who had sought review in that Court. The judgment was mailed to the Clerk of our court who in turn forwarded it to the clerk's office of the district court where it was received on August 16, 1976.

The Civil Rights Attorney's Fees Awards Act of 1976 was signed into law on October 19, 1976, and on November 1, 1976, the plaintiffs filed their motion in the district court for an award of costs and attorneys' fees. Their motion noted that the district court had not acted upon the

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[2] Reported *sub nom. McCrary v. Runyon*, 515 F.2d 1082 (4 Cir. 1975).

plaintiffs' request for costs in that court[3] under 28 U.S.C. § 1920, and that the costs awarded to the defendants under the order of the Supreme Court had not been taxed by the Clerk of the district court as part of that court's final judgment. The motion requested that the district court enter an order settling the costs and awarding attorneys' fees in the amount of $53,475.00 as part of the costs as provided in the 1976 amendment. The district court denied the request for attorneys' fees and ruled that each party should bear its own costs in that court. The order also provided that the costs assessed against the plaintiffs by the Supreme Court should be paid to the defendants as specified in that Court's judgment.[4]

[1] The plaintiffs rely primarily upon *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), as well as our decision in *Alphin v. Henson*, 552 F.2d 1033 (4 Cir., 1977). However, in our opinion neither of those cases supports the plaintiffs' position. The issue in *Bradley* was stated by the Court as follows:

> "The question, properly viewed, then, is not simply one relating to the propriety of retroactive application of § 718 to services rendered prior to its enactment, but rather, one relating to the applicability of that section to a situation where the propriety of a fee award was pending resolution on appeal when the statute became law." 416 U.S. at 710, 94 S.Ct. at 2015.

[3] The amount of costs claimed by the plaintiffs was $153.09 from Fairfax-Brewster School, Inc., and $162.37 against Bobbe's School.

[4] While the plaintiffs' motion was pending in the district court, the defendants filed motions in this court requesting that we require the plaintiffs to reimburse each defendant for an appropriate share of the cost of printing the appendix. The order of the district court expressly stated that it declined to rule on this aspect of the case. By order entered in this court on January 24, 1977, we directed that costs for the preparation of the appendix should be shared proportionately by the parties based upon the respective materials submitted.

The award of fees in that case was based upon the well recognized "principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711, 94 S.Ct. at 2016. Unlike *Bradley*, in the present case the amendment was not enacted while the appeal was pending, but was signed into law over two months after the judgment of the Supreme Court had been filed in the district court. In the light of this chronology, it is clear that the plaintiffs are not entitled to the benefit of *Bradley's* rationale.

[2] Similarly, our decision in *Alphin* is inapposite. In that case the plaintiffs' claim to attorney's fees was the sole subject of the appeal. Our initial decision was adverse to the plaintiffs, and on June 25, 1976, we stayed our mandate to permit them to petition for certiorari. The petition for certiorari was filed in the Supreme Court on August 16, 1976, and on September 30, 1976, the statute authorizing the award of such fees was enacted. Certiorari was denied on November 15,1976, and two days thereafter a petition for rehearing based upon the newly enacted statute was filed with us. We granted a further stay of our mandate to consider the plaintiffs' claim. Noting that "[o]ur control over a judgment of our court continues until our mandate has issued," 552 F.2d at 1035, we concluded that our decision in that case had not become a finality and that, accordingly, it was appropriate to amend our previous decision to bring

it into conformity with the newly enacted statute. As heretofore noted, in the present case the judgment of the Supreme Court had been filed with the Clerk of the district court on August 16, 1976, over two months prior to the effective date of the Fees Awards Act of 1976. Further jurisdiction of the district court was dependent upon the terms of the appellate mandate, and the court had no authority to reopen the case for the consideration of attorneys' fees or to conduct any proceedings except those specifically authorized by the appellate judgment. *See DuBuit v. Harwell Enterprises, Inc.*, 540 F.2d 690, 693 (4 Cir. 1976).

[3] While we affirm the denial of attorneys' fees, we think the district court acted improperly in directing that each party should bear its own costs in that court. In its order of July 27, 1973, the court had awarded such costs to the plaintiffs, and none of the parties had appealed from that aspect of the initial judgment order. Since the award of such costs had become a finality, the district court had no authority to alter it in any way in carrying out the judgment of the Supreme Court of the United States. Accordingly, we reverse the action of the district court in this respect and remand the case with directions to reinstate the taxation of costs under 28 U.S.C. § 1920 against the defendants.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B

JUDGMENT

United States Court of Appeals
For the Fourth Circuit

No. 77-1278

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales, and Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary,

Appellants,

vs.

Fairfax-Brewster School, Inc., Russell L. Runyon, Katheryne E. Runyon and Southern Independent School Association,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part; reversed in part; and the case remanded to the United States District Court for the Eastern

District of Virginia, at Alexandria, with directions consistent with the opinion of this Court filed herewith.

/s/ William K. Slate II
Clerk

[Filed Jan. 30, 1978]
U.S. Court of Appeals
Fourth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1278

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales, and Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary,

Appellants,

versus

Fairfax-Brewster School, Inc., Russell L. Runyon, Katheryne E. Runyon and Southern Independent School Association,

Appellees.

[Filed Mar. 29, 1978]
William K. Slate, II
Clerk

ORDER

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Field for a panel consisting of Judge Haynsworth, Judge Winter and Judge Field.

FOR THE COURT:

/s/ William K. Slate, II
Clerk

A True Copy, Teste:
William K. Slate, II, Clerk

By /s/ Emily Rueger

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COLIN M. GONZALES, et al. Plaintiffs,	)	
V.	)	CIVIL ACTION NO. 494-72-A
FARIFAX-BREWSTER SCHOOL INC., Defendant.	)	
MICHAEL C. McCRARY, et al., Plaintiffs,	)	
V.	)	CIVIL ACTION NO. 495-72-A
RUSSELL L. RUNYON, et al., Defendants.	)	

ORDER

This matter came on to be heard on December 10, 1976, on the plaintiffs' request for taxing of costs, including attorneys' fees, and after hearing argument thereon it is

ORDERED that the plaintiffs' motion for attorneys' fees be denied, and each party shall bear its own costs in this Court, in the Court of Appeals and in the Supreme Court, except that the costs assessed against the plaintiffs in the Supreme Court in the amount of $516.66 shall be deducted by the defendants from the judgment in favor of plaintiffs when that judgment is paid, and this Court expressly does not rule on the question of the payment of cost for the Appendix before the Fourth Circuit Court of Appeals, the question as to who should pay that cost being now before that Court.

/s/ A. V. B. Jr.
United States District Judge

Alexandria, Virginia
December 14, 1976